UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TIFFANY AND COMPANY and
TIFFANY & CO.

and **Case No. 01-CA-111287**

SHAUN DEACON, An Individual

Thomas E. Quigley, Esq.,
for the General Counsel.
***Dean R. Singewald II, Esq., (Epstein Becker & Green, P.C.)*,**
Stamford, CT, for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge and an amended charge filed by Shaun Deacon, An Individual, on August 15, 2013, and February 27, 2014, respectively, a complaint and an amended complaint (collectively referred to as the complaint) was issued against Tiffany and Company and Tiffany & Co. (Respondents or Employers), on December 31, 2013 and April 25, 2014, respectively.

The complaint alleges that since about mid-February, 2013, the Respondents maintained certain rules under the heading "Policy for Protection of Confidential Information." The Policy is set forth in full in the complaint which alleges that all the rules in the entire Policy are unlawful. However, the Counsel for the General Counsel stipulated that only certain rules set forth in the Policy violate the Act.

The Respondents' answer denied the material allegations of the complaint and asserted certain affirmative defenses, principally that the Policy's "savings clause" specifically acknowledges the rights of employees under the Act and provides that the prohibitions in the Policy do not apply to employees in the exercise of those rights.

Before the hearing opened, the Respondent filed a Motion to Dismiss the complaint, asserting that the savings clause required dismissal of the complaint. The General Counsel filed an Opposition, and I issued an Order denying the Motion. [1]

A hearing was held on June 10, 2014.[2] On the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

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[1] The Opposition argued that the Motion should have been filed with the Board, and that it should be denied on the merits. The Executive Secretary of the Board responded that the Motion should have been filed with the Board but in any event was filed too late, and, nevertheless, it may be filed with me.

[2] The hearing was held telephonically in a procedure for a stipulated record agreed to by all parties. A court reporter recorded the proceedings. Documentary evidence and certain stipulations were received.

Continued

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent Tiffany and Company, a New York corporation having a retail store in Farmington, Connecticut, has been engaged in the retail design and sale of specialty jewelry. The other Respondent, Tiffany & Co., a Delaware corporation having an office in New York, New York, is a holding company that operates through its affiliated companies and subsidiaries, including Respondent Tiffany and Company.

In the past twelve months, Respondent Tiffany and Company derived gross revenues in excess of $500,000 and purchased and received at its Farmington, Connecticut facility goods valued in excess of $50,000 directly from points located outside Connecticut. Similarly, in the past twelve months, Respondent Tiffany & Co. derived gross revenues in excess of $500,000 and provided services valued in excess of $50,000 to enterprises located outside New York State.

The Respondents admit and I find that each has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II.The Facts

The Respondents have maintained a policy entitled "Business Conduct Policy – Worldwide" which includes certain work guidelines and procedures, including those under Section III with the heading "Policy for Protection of Confidential Information." The most recent edition is dated January 4, 2013. The Policy is issued electronically via a Learning Management System Module on the Employers' intranet to new U.S. employees upon commencing employment, and to existing U.S. employees annually thereafter.

Employees review the Policy in January of each year. They have the opportunity to print out a hard copy of the Policy, and acknowledge receipt of the Policy electronically by checking a box in the Learning Management System Module. The Policy remains available on the Respondents' intranet at all times.

The entire Policy is as follows:

> III. POLICY FOR PROTECTION OF CONFIDENTIAL INFORMATION
>
> Confidential Company information must not be disclosed except when authorized hereunder. In general, the term "Confidential Company Information" means information which is not generally known outside the Company and which, if known, would aid our competitors or potential competitors or otherwise injure the Company. Confidential Company Information includes, but is not limited to the following: Names, addresses, telephone numbers and non-Company email addresses of our customers (emphasis

No witnesses testified.

in original) and employees, as well as any non-public personal information of our customers and employees (non-public personal information includes, but is not limited to, social security, or insurance or other government identification numbers; employer name or employer identification numbers; credit card numbers; financial account numbers; personal or family particulars; financial information; history of purchases or other transactions; credit, financial, benefits, medical and employer records and data; and any similar information); customer lists or mailing lists, the identity of our vendors, designers or other sources of merchandise; unpublished designs, product ideas, names, know-how or methods of manufacture; advertising, strategic marketing or operational plans; sales agents; employee lists and phone directories; any and all financial data including sales, earnings, tax information, cash flow and information regarding the Company's indebtedness or investments. Confidential Company Information includes written and oral information, as well as all electronic data.

All employees have the responsibility of protecting Company Confidential Information to ensure:

- that all requests or questions by any media representative (newspaper, magazines, television or radio, etc.) for information regarding the Company should be directed to the Vice President – Public Relations or the Vice President – Investor Relations.

- that it is distributed within the Company only to those who have a need to know.

- that it is not disclosed outside the Company except when authorized by a senior officer of the Company.

- that unnecessary copies of such information are not made.

- that all written or physical embodiments of such information are properly safeguarded, and

- that all physical embodiments of such information are returned to the Company upon termination of employment.

Members of management at all levels should make every effort to ensure that all employees understand and adhere to the procedures stated in the Policy statement. An employee who without authority divulges or fails to appropriately safeguard Company Confidential Information is subject to termination.

Information concerning the wages, benefits or other terms of employment paid by the Company to employees in general, with respect to specific positions, or specific individuals, is considered confidential information for purposes of this Policy and may not be disclosed outside the Company except as approved in writing by the Human Resources Department. This Policy does not apply to

> employees who speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment in the exercise of their statutory rights to organize or to act for their individual or mutual benefit under the National Labor Relations Act or other laws.

The General Counsel stipulated that only the following parts of the Policy which prohibit the disclosure of such information, without the Employers' approval, violate the Act:

- Non-Company names, addresses, telephone numbers, email addresses of employees, and employee lists.
- All requests or questions by any media representative (newspaper, magazines, television – or radio, etc.) for information regarding the Company.
- Information concerning the wages, benefits or other terms of employment paid by the Company to employees in general, with respect to specific positions, or specific individuals.

III. The Positions of the Parties

The General Counsel alleges that the rules at issue are overbroad and violate Section 8(a)(1) of the Act. The Respondent asserts that the rules are not unlawful, and if they are, the savings clause specifically acknowledges the rights of employees under the Act and provides that the prohibitions in the Policy do not apply to employees in the exercise of those rights.

Analysis and Discussion

I. The Procedural Issue

The *Noel Canning* Argument

In *NLRB v. Noel Canning*, __U.S. __, 2014 WL 2882090, the Supreme Court decided that the Board lacked a lawfully appointed quorum on January 4, 2012 because President Obama's recess appointments made that day for three positions in the five-member Board were invalid.

The Employers, citing *Hooks v. Kitsap Tenant Support Servs*., __F.Supp__ (W.D.Wash. 2013), argue that inasmuch as Jonathan Kreisberg and John Cotter were appointed as the Regional Director of the Boston Region and the Officer-In-Charge of the Hartford Subregional Office, respectively, on December 10, 2012 during the period of time that the Board lacked a lawfully appointed quorum of three Members, their issuance of the complaint and amended complaint was improper, and accordingly those pleadings must be dismissed.

In *Kitsap*, the court granted a motion to dismiss a petition for a Section 10(j) injunction. The court found that Regional Director Hooks improperly issued a complaint because the Board lacked a quorum at that time. The court reasoned that since the petition must be based on a validly issued complaint, the petition must be dismissed.

In reaching its decision, the court relied heavily on the court of appeals' decisions in *N.L.R.B. v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), and *N.L.R.B.*

v. New Vista Nursing and Rehabilitation, 719 F.3d 203 (3d Cir. 2013). However, those cases denied enforcement to *Board decisions and orders* because the *Board* lacked a quorum.[3] Here, the issue is whether the *General Counsel* properly issued the complaints in the absence of a validly appointed Board quorum.

Other district courts have come to the opposite conclusion than the one reached in *Hooks v. Kitsap.* In *Hooks v. Remington Lodging & Hospitality, LLC,* __F.Supp.2d __ (D. Alaska 2014), the employer made a similar argument to that made here. The employer argued that because the General Counsel has the statutory authority to issue complaints only "on behalf of the Board," any complaint issued on behalf of the Board during a time when the Board lacked a quorum was invalid. The employer cited *NLRB v. Enterprise Leasing Co.,* and *NLRB v. New Vista Nursing,* each of which, as noted above, concluded that because the Board lacked a valid quorum during the relevant time, Board orders issued during that time were invalid. The *Remington* court held that those cases did not concern the validity of *complaints* issued by the General Counsel, who has the independent statutory authority to issue complaints pursuant to the plain language of Section 3(d). The court held that whether the Board had a quorum is not determinative of the validity of the administrative complaints issued by the General Counsel pursuant to Section 3(d).

Similarly, district courts have held that the General Counsel has the lawfully-designated power to issue complaints and institute Section 10(j) petitions even in the absence of a validly appointed Board quorum. *Paulsen ex rel. N.L.R.B. v. All American School Bus Corp.,* 967 F.Supp.2d 630 (E.D.N.Y. 2013); *Paulsen v. Renaissance Equity Holdings*, LLC, 849 F.Supp.2d335, 345, 350 (E.D.N.Y. 2012); *Paulsen v. Remington Lodging & Hospitality, LLC,* __F.Supp.2d __ (E.D.N.Y. 2013).

In November, 2011, the Board stated that it:

> [A]nticipates that in the near future it may, for a temporary period, have fewer than three Members of its full complement of five Members. The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public to the greatest extent possible, the Board has decided to temporarily delegate … to the General Counsel "authority over the appointment … of any Regional Director or of any Officer-in-Charge of a Subregional Office … , subject to the right of any sitting Board Member to request full-Board consideration of any particular decision. In the absence of a request by any sitting Board Member for full-Board consideration of a particular decision, the decision of the General Counsel will become final 30 days after the then-sitting Board Members are notified thereof …. 2011 Delegation 76 Fed.Reg. 73719.

[3] Another basis for the decision in *Kitsap* was that Acting General Counsel Solomon was allegedly improperly appointed by President Obama. That issue is not present here since General Counsel Richard Griffin was appointed by the President on October 29, 2013, after all five Board members were confirmed by the Senate.

In addition, on July 18, 2014, the five-member Board "adopted and ratified, *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive" which includes the appointments of Director Kreisberg and Officer Kotter.

Based on the above, I find that the temporary delegation to the General Counsel of authority to appoint Director Kreisberg and Officer Kotter was effective. I further find that their issuance of the complaint and amended complaint in this matter was proper. I accordingly deny the Respondents' request that those pleadings be dismissed.

II. The Substantive Issues

The complaint alleges that certain rules maintained by the Respondents are unlawful. The determinative test of legality of these rules is whether employees would reasonably construe the language of the challenged rule to prohibit protected Section 7 activity.

The Board's standard in evaluating work rules is set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004):

> The Board has held that an employer violates section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, none of the rules explicitly restrict Section 7 activity. In addition, there is no contention by the General Counsel that any of Respondents' rules that are alleged to be unlawful were promulgated in response to union activity or that any of the rules have been applied to restrict the exercise of Section 7 rights. Accordingly, the rules will violate Section 8(a)(1) if it can be shown that employees would reasonably construe their language to prohibit Section 7 activity.

A. The Policy's Provisions which Allegedly Violate the Act

The General Counsel challenges three of the Policy's rules which prohibit the disclosure of the following information without authorization:

- Names, addresses, telephone numbers, non-company email addresses of employees, and employee lists.

- All requests or questions by any media representative (newspaper, magazines, television or radio, etc.) for information regarding the Company should be directed to the Vice President – Public Relations or the Vice President – Investor Relations.

- Information concerning the wages, benefits or other terms of employment paid by the Company to employees in general, with respect to specific positions, or specific individuals.

1. Names, addresses, telephone numbers, non-company email addresses of employees, and employee lists.

The Policy states that Confidential Company Information which may not be disclosed includes the names, addresses, telephone numbers, non-company email addresses of employees, and non-public personal information of employees which includes employee lists.

In *Albertson's, Inc.*,351 NLRB 254, 259, 366 (2007), the Board held that the maintenance of a confidentiality rule which prohibited employees from providing a copy of a work schedule with a listing of employee names to a union representative violated the Act. The confidentiality rule prohibited employees from disclosing "confidential information or any other similar act constituting disregard for the company's best interest." Although the Board noted that the employer used that rule to discipline an employee for providing the information to assist a union, the Board nevertheless found that the "maintenance of the confidentiality rule would reasonably tend to chill employees in the exercise of their Section 7 rights" and violated the Act.

In *Ridgely Manufacturing Co.,* 207 NLRB 193, 197 (1973), the Board found that an employee's obtaining names of employees on timecards for the purpose of organizing was protected, concerted activity, emphasizing that an employee may do so if such information came to his attention in the normal course of work activity and association and was not obtained by surreptitiously accessing employer records.

The Respondents' rule is overbroad because it does not distinguish between information obtained by an employee during his normal work routine and data obtained from the Respondents' internal business records. An employee may disclose this data if it came to his attention in the normal course of his work activity but is not entitled to obtain his employer's private or confidential records. *Ridgely*, above, at 197.

Here, the Employers' rule prohibits the disclosure of employee names, addresses, telephone numbers and employee lists, regardless of the source of such information. Although the proscribed information is called "Confidential Company Information … which is not generally known outside the Company," it is clear that such information would not generally be known outside the employer. However, such information may be lawfully obtained by employees assembling such data by association with other workers or "in the course of their normal work relationship*." Ridgely*, above at 197. The rule unlawfully prohibits the disclosure of such information without regard to how the information was obtained or where it was obtained from, thereby broadly forbidding the disclosure from any source.

I accordingly find and conclude that employees would reasonably construe the rule to prohibit Section 7 activity which includes disclosing the names, addresses, telephone numbers, email addresses of employees and employee lists. I therefore conclude that the rule violates Section 8(a)(1) of the Act.

> **2. All requests or questions by any media representative (newspaper, magazines, television or radio, etc.) for information regarding the Company should be directed to the Vice President – Public Relations or the Vice President – Investor Relations.**

The rule states that "all employees have the responsibility of protecting Company Confidential Information to ensure that all requests or questions by any media representative (newspaper, magazines, television or radio, etc.) for information regarding the Company should be directed to the Vice President – Public Relations or the Vice President – Investor Relations."

It is well settled that Section 7 of the Act encompasses employee communications about labor disputes with the media. *Trump Marina Associates*, 354 NLRB 1027, 1029-1030 (2009) and 355 NLRB 1027 (2010), enfd., 435 Fed.Appx. 1 (D.C.Cir. 2011); *Crowne Plaza Hotel*, 352 NLRB 382, 386 fn. 21 (2008).*Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees Union, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

Employees would reasonably construe the unequivocal language in the Respondents' rule as prohibiting any protected communications to the media regarding a labor dispute. It is significant that the rule makes no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected. *Valley Hospital Medical Center*, above, at 1252-1253; *Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir. 2007). The Board has consistently found similar rules which prohibit employee communications with the media to be overbroad and unlawful. *HTH Corp.*, 356 NLRB No. 182, slip op. at 2, 25 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Leather Center, Inc.*, 312 NLRB 521, 525, 528 (1993).

Here, although there is no evidence of an ongoing labor dispute, the rule broadly prohibits any responses to media requests or questions. The rule would necessarily include communications about labor disputes if they were to occur.

In addition, the Board has also held that an employer may not require that employees obtain supervisory or managerial approval prior to speaking with the media or engaging in Section 7 activity. *Crowne Plaza Hotel*, above, at 387; *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

The Respondents argue that this rule seeks to restrict the disclosure of "information regarding the Company," not employee information. The term "regarding the Company" is very broad and clearly encompasses everything about the Employers, including their employees. I accordingly cannot find that the rule does not apply to employees and their concerns which may lawfully be expressed to the media.

The Respondents correctly argue that the rule does not prohibit employees from contacting the media regarding any employee matter, but only restricts them from responding to requests or questions from that source. However, assuming that, without violating the rule, an employee contacts the media concerning an employee issue, and, in response, the media

representative asks the employee a question or requests additional information, the rule would unlawfully prohibit the worker from responding.

I accordingly find that the Respondents' media policy is overbroad, and could reasonably be interpreted by employees as prohibiting activity protected by Section 7 of the Act. It precludes employees from responding to any media inquiries at all, requiring that any requests or questions be directed to the Employers' vice presidents.

The Policy's prohibition against responding to media inquiries states that its purpose is to protect company confidential information. However, such information has been defined as data related to employees including their personal information such as names, addresses, phone numbers, wages and benefits. Such information may not be restricted from disclosure.

I accordingly find and conclude that employees would reasonably construe the rule to prohibit Section 7 activity, and therefore the rule violates Section 8(a)(1) of the Act.

> **3. Information concerning the wages, benefits or other terms of employment paid by the Company to employees in general, with respect to specific positions, or specific individuals, is considered confidential information for purposes of this Policy and may not be disclosed outside the Company except as approved in writing by the Human Resources Department.**

The law is well settled that a prohibition of the discussion of wages and terms and conditions of employment infringes upon Section 7 rights and violates Section 8(a)(1) of the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004); *Mediaone of Greater Florida, Inc.,* 340 NLRB 277, 281 (2003); *Waco, Inc.,* 273 NLRB 746, 748 (1984).

In *NLS Group*, 352 NLRB 744, 745 (2008), the Board found that the employer's policy precluding employees from discussing "compensation and other terms of employment with "other parties" violated the Act. The Board, finding that the confidentiality provision was unlawfully overbroad, reasoned that employees "would reasonably understand that language as prohibiting discussions of their compensation with union representatives."

I accordingly find that and conclude that employees would reasonably construe the rule to prohibit Section 7 activity, and therefore the rule violates Section 8(a)(1) of the Act.

B. The Savings Clause

> This Policy does not apply to employees who speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment in the exercise of their statutory rights to organize or to act for their individual or mutual benefit under the National Labor Relations Act or other laws.

In *First Transit, Inc*., 360 NLRB No. 72, slip op. at (2014), the Board found that certain rules violated the Act. In holding that the respondents' savings clause did not insulate the unlawful rules, the Board stated that "an employer's "express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule." The Board also stated that a savings clause "should adequately address the broad panoply of rights protected by Section 7." The Board held that the clause's statement that the employer supported the employees' right to choose whether to vote for or

against union representation without influence or interference from management was too narrow. *First Transit*, above, slip op. at 1.

I reject the General Counsel's argument, based on *First Transit*, that a savings clause may only apply to rules which are ambiguous, and that since the rules here are clear, the savings clause is not effective. Whether ambiguous or clear, the question is whether the savings clause insulates the rule from a finding of violation. I see no distinction in whether the clause is ambiguous or clear. The savings clause clarifies the scope of both ambiguous and clear rules. The question is not whether an "unlawful" rule is canceled by such a provision. Instead, the question is whether a "reasonable" employee, would be influenced by such a provision.

I will discuss the Respondents' savings clause as it relates to each of the prohibitory provisions, above. The Employers urge that I "cannot look at three discrete provisions of the Policy in isolation …. Rather, [I] need to take into account the entire Policy," citing *Lutheran Heritage,* above.[4] In *Albertson's*, above, 351 NLRB at 258, the Board stated that the judge erred by lumping the three rules together, noting that in *Lafayette Park Hotel,* the Board separately examined each rule at issue to determine whether that particular rule was unlawful. Accordingly, each of the three provisions will be examined in order to determine whether each is insulated by the savings clause.

1. Disclosure of Wage and Salary Information

I find that the savings clause properly immunizes from a finding of violation the clause prohibiting the disclosure of information concerning the wages, benefits or other terms of employment paid by the Company to employees.

The clause follows the guidelines set forth in *First Transit* to ensure that employees do not read otherwise overbroad rules as restricting their Section 7 rights.

First, the savings clause essentially tracks the language of the prohibition and provides that the Policy does not apply to the topics barred from disclosure. Thus, the Policy prohibits the disclosure of "information concerning the wages, benefits or other terms of employment paid by the Company to employees." The savings clause states that the Policy "does not apply to employees who speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment."

Second, the savings clause is proximate to the rule it purports to inform, appearing immediately following the unlawful prohibition of the disclosure of wage and salary information. Finally, the savings clause expressly references the unlawful rule.

Inasmuch as I find that the Respondents' rule prohibiting the disclosure of wage, salary and benefit information has been effectively canceled by the savings clause, I find no violation in the maintenance of that rule.

2. Disclosure of employee personal information and contact with the media

I reach a different conclusion, however, regarding the two other rules maintained by the Respondents. Those rules prohibit without authorization (a) the disclosure of names, addresses,

[4] Employers' brief, p. 11.

telephone numbers, non-company email addresses of employees, and non-public personal information of employees which includes employee lists and (b) employee responses to requests or questions by any media representative (newspaper, magazines, television or radio, etc.) for information regarding the Company.

The savings clause does not refer to those specific items prohibited from disclosure. It does not specifically permit employees to disclose the employee personal information set forth above, or permit them to answer requests or questions from the media.

In this respect, the Employers argue that the savings clause's acknowledgement of the right of employees to speak with "others" about their wages, benefits, or other terms of employment, necessarily permits workers to speak with the media and thereby cancels the unlawful prohibition on such contact with the media. The Employers thus argue that the savings clause is broad enough to immunize those parts of the Policy from being found unlawful.

I do not agree. The savings clause permits the disclosure by employees only of "wages, benefits or other terms of employment in the exercise of their statutory rights to organize or to act for their individual or mutual benefit under the National Labor Relations Act or other laws." It does not expressly or implicitly permit employees to disclose names, addresses, etc., of co-workers, or respond to requests or questions from the media.

Further, the savings clause permits employees to speak only about their compensation – "wages, benefits or other terms of employment." It does not refer to their "conditions of employment." Significantly, the savings clause essentially tracks that part of the rule concerning the disclosure of information concerning compensation – prohibiting employees from disclosing their "wages, benefits or other terms of employment paid by the Company to employees…." I therefore find that the savings clause was intended to apply to, and in fact, applies only to the rule concerning the disclosure of compensation information.

Significantly, the savings clause thus does not permit employees to disclose their "conditions of employment" with the media or others which is a protected right. *Trump Marina Casino,* above, and *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000).

Viewing the two rules at issue from the employee's perspective, in deciding whether to disclose personal information or respond to media inquiries, a reasonable worker would have great reservations as to whether he could properly engage in such disclosures in reliance on the savings clause. This is particularly so since the savings clause expressly permits only the disclosure of wage and benefit information.

I find that a reasonable employee would decide to comply with the Respondents' prohibitions on disclosing personal employee information and not respond to media inquires rather than undertake the task of (a) determining whether the savings clause applies to the specific and distinct prohibitions in the Policy, and then (b) attempting to assert those rights under the savings clause at the risk of being "subject to termination."

In *Ingram Book, Co.,* 215 NLRB 515, 516 fn. 2 (1994), the Board noted that "rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."

The question that must ultimately be answered is whether these two work rules "reasonably tend to chill employees in the exercise of their Section 7 rights." "Clearly, the way in

which employees may reasonably construe the language is pivotal." *Security Walls*, 356 NLRB No. 87, slip op. at 15 (2011).

I find that a reasonable employee would not read the savings clause as permitting him to disclose personal employee information or respond to media requests. He would thus not lose the chill that the rules under challenge cause.

In *Allied Mechanical*, 349 NLRB 1077, 1084 (2007), the Board held that "an employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law." *Ingram Book, above; McDonnell Douglas* Corp., 240 NLRB 794, 802 (1979).

I accordingly find that, notwithstanding the savings clause, employees would reasonably construe the rules at issue to prohibit protected Section 7 activity.

Further, it is the Employers, the drafters of the Policy, who should have avoided the lack of clarity as to what specific provisions the savings clause applied to. Chief Justice Warren stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 at 620 (1969), that "an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior."

C. The Protection of the Respondents' proprietary information

The Employers argue that the Policy is designed to protect the confidentiality of the Respondents' proprietary business, customer and private employee information rather than prohibit discussion by employees of their wages, benefits and other terms of employment.

They contend that they have a legitimate interest in maintaining the confidentiality of their private business information by prohibiting the disclosure of company business and documents without prohibiting employees from discussing their terms and conditions of employment.

The Employers assert, as evidence of their intent to protect their propriety information, that the information prohibited from disclosure is that which is "not generally known outside the Company and which, if known, would aid our competitors or potential competitors or otherwise injure the Company."

According to that definition, employees have a heavy, if not impossible, burden in determining whether the disclosure of such information would harm the Respondents in the ways contemplated by the Policy. It is doubtful whether an employee is capable of deciding if the disclosure of basic information such as that set forth above would aid the Respondents' competitors or potential competitors or injure the Employer. Such a determination requires direct knowledge by the employee that the revelation of such material would, not may, harm the Employers.

The Respondents, relying on *Mediaone,* above, contend that employees, reading the Policy and the savings clause as a whole would reasonably understand that it was "designed to protect the confidentiality of the Company's proprietary business, customer and private employee information rather than to prohibit discussion of employee wages," *Mediaone,* at 278-279.

That case, however, involved a prohibition on disclosing clearly proprietary information, including "business plans, technological research and development, product documentation,

marketing plans and pricing information, copyrighted works, trade secrets and non-public information, financial information, and patents, copyrights, trademarks, service marks, trade names and goodwill, and customer and employee information, including organizational charts and databases."

The Board held in *Mediaone* that "employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the Respondents' propriety business information rather than to prohibit discussion of employee wages." The Board noted that the rule, unlike the rule here, "does not explicitly prohibit the discussion or disclosure of wages, hours, working conditions, or any other terms and conditions of employment…." The Board further found that "although the phrase …employee information … is not specifically defined in the rule it appears within the larger provision prohibiting disclosure of proprietary information, including *information assets and intellectual property* and is listed as an example of 'intellectual property.'" (Emphasis in original).

Here, it is true that the Policy prohibits the disclosure of propriety information such as "unpublished designs, product ideas, know-how or methods of manufacture, strategic marketing or operational plans." However the Policy here, unlike the rule in *Mediaone*, specifically prohibits the disclosure of information which may lawfully be disclosed, such as names, addresses, telephone numbers, non-company email addresses of employees, employee lists, wage and benefit and other terms of employment, and prohibits responses to requests or questions by the media.

The central question is whether employees would recognize "the legitimate business reasons" for which the Policy was promulgated and would not believe that it reaches Section 7 activity. *Lafayette Park,* above, at 827. There is nothing in the Policy that clearly explains that the restrictions apply only to "legitimate business concerns" and not to employees' protected, lawful disclosure of information.

The Respondents' claims that it "established substantial and legitimate business justifications" for its Policy prohibiting the disclosure of information has not been proven. Indeed, an otherwise overbroad rule "can nonetheless be lawful if [it] is justified by significant employer interests." *Lafayette Park Hotel*, above, at 825 fn. 5. But the Employers have failed to demonstrate that they have legitimate business and proprietary interests in the type of information prohibited from disclosure. There is nothing in the Policy that clearly explains that the restrictions apply only to "legitimate business concerns" and not to the disclosure of information protected by the Act.

Conclusions of Law

1. The Respondents are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondents have violated Section 8(a)(1) of the Act by the following conduct:

(a) Since January 4, 2013, maintaining an overly broad rule prohibiting employees from disclosing without authorization, the names, addresses, phone numbers, non-company email addresses of employees, and employee lists.

(b) Since January 4, 2013, maintaining an overly broad rule prohibiting unauthorized communication in response to requests or questions by media representatives for information regarding the Company.

3. The Respondents have not violated Section 8(a)(1) of the Act by maintaining an otherwise overbroad rule prohibiting unauthorized employee disclosure of "information concerning the wages, benefits or other terms of employment paid by the Company to employees." Because the Policy states that it did not apply when employees "speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment in the exercise of their statutory rights to organize or act in their individual or mutual benefit" under the National Labor Relations Act, employees could not reasonably construe that rule to prohibit Section 7 activity.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action, as set forth below, designed to effectuate the policies of the Act.

Because the Respondents' "Policy for Protection of Confidential Information" is distributed and maintained at its various facilities, a nationwide posting remedy is appropriate. *First Transit,* above, slip op. at 14.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent Tiffany and Company, Farmington, Connecticut, and the Respondent, Tiffany & Co., New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad rule prohibiting employees from disclosing, without authorization, the names, addresses, phone numbers, non-company email addresses of employees, and employee lists.

(b) Maintaining an overly broad rule prohibiting unauthorized communications in response to requests or questions by media representatives for information regarding the Company.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, rescind and/or revise, nationwide, the rules set forth in paragraphs 1(a) and 1(b) of this Order, above.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Furnish all employees at all of the Respondents' facilities in the United States with (1) inserts for the current Business Conduct Policy – Worldwide that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute a revised Business Conduct Policy – Worldwide that does not contain the unlawful rules.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since January 4, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 5, 2014

_____
Steven Davis
Administrative Law Judge

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain overly broad rules which restrain you in the exercise of your Section 7 rights.

WE WILL NOT prohibit you from disclosing, without authorization, employee names, addresses, telephone numbers, non-Company email addresses of employees, and employee lists.

WE WILL NOT prohibit you from making unauthorized responses to requests or questions by any media representative (newspaper, magazines, television or radio, etc.) regarding the Company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days, rescind and/or revise the overly broad rule as maintained in our Business Conduct Policy) described above.

WE WILL furnish you with (1) inserts for the current Business Conduct Policy – Worldwide that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful cover or correct the unlawful rules; or publish and distribute a revised Business Conduct Policy – Worldwide that does not contain the unlawful rules.

TIFFANY AND COMPANY AND TIFFANY & CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601
Boston, Massachusetts 02222–1072
Hours of Operation: 8:30 a.m. to 5 p.m.
617-565-6700.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-111287 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.